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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5269

ROBERT EDWARDS, Petitioner

v.

THE STATE OF ARIZONA, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE ARIZONA SUPREME COURT

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August 27, 1979

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No. _____

ROBERT EDWARDS, Petitioner,

vs.

STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE ARIZONA SUPREME COURT

Petitioner, Robert Edwards, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Arizona Supreme Court entered in this proceeding on March 27, 1979.

OPINION BELOW

The opinion of the Arizona Supreme Court, reported at 594 P.2d 72, appears in Appendix A hereto.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on March 27, 1979. It remanded the case to the trial court to resentence Petitioner on the murder conviction. The order is Appendix B to this Petition. A timely motion for rehearing was denied by the Arizona Supreme Court on May 2, 1979. That order is Appendix C to this Petition. On 18 July 1979, Mr. Justice Stevens entered an order under this Court's Docket No. A-48, extending the time for filing a petition for writ of certiorari to and including August 29, 1979. On July 20, 1979, the Pima County Superior Court entered its order, in its Case No. A-30683, setting aside

the sentence of death it had previously imposed upon Petitioner, and imposing a sentence of life imprisonment upon him. The order of the Superior Court of the State of Arizona in and for the County of Pima, is attached as Appendix B to this Petition. Petitioner's conviction and sentence having thereby become final, as has the opinion and order of the Arizona Supreme Court, the jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Fifth, Sixth, and Fourteenth Amendments require suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation; which resulted from a jailhouse interrogation that Edwards objected to but was compelled to attend after being held in solitary confinement overnight; and where the interrogation was instigated by detectives who timed the questioning to occur just hours before they knew he was to be provided appointed counsel.

2. Whether the presumption of innocence guaranteed by the Fourteenth Amendment was violated when the trial was conducted over Edwards' objection at having to appear in "jailhouse slippers and clothes".

3. Whether completely precluding a defense witness from giving admissible testimony, as a sanction for untimely compliance with Arizona discovery procedures, violates the compulsory process guaranteed by the Sixth and Fourteenth Amendments, where there was virtually no showing that the State was in any way prejudiced by the tardy disclosure of the name of the witness.

4. Whether the prosecutor's summation violated Edwards' Fifth Amendment rights by his repeated comment on Edwards' failure to testify; which error was said to have been invited by the fact that Edwards conducted his own defense and summed up for himself.

5. Whether a delay of fourteen months from arrest to trial violated Edwards' Sixth Amendment right to a speedy and public trial, which he repeatedly asserted.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment XIV: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law,. . ."
>
> Amendment V: "No person. . .shall be compelled in any criminal case to be a witness against himself. . ."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

In October, 1974, the "La Conga" bar in Tucson, Arizona was robbed at gunpoint, just as the proprietor and a barmaid were closing for the evening. The proprietor, 74 years old, suffered a fatal heart attack during the robbery. Petitioner Robert Edwards was one of four individuals implicated by a felon and heroin user named Cleveland Reed who was apprehended during 1975 by the Tucson police on other criminal charges, and given complete immunity from all prosecution related to the La Conga bar incident, as well as special treatment in connection with other criminal charges. Edwards, an indigent black, was arrested on January 19, 1976, on a warrant charging him with murder, burglary, and robbery. Edwards was ultimately convicted of first degree felony murder, as well as burglary and robbery. He was first sentenced to death, but later given life imprisonment.[1] One co-defendant was similarly convicted and sentenced, while another was acquitted of felony murder by a jury, and convicted of the

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[1] The change in sentence was a result of the Arizona Supreme Court applying the Locket and Bell decisions of this Court to invalidate certain portions of the Arizona death sentencing statute.

burglary and robbery charges. Cleveland Reed, of course, went completely free.

After Edwards' arrest on January 19, 1976, he was taken to the Tucson Police Station, read his Miranda rights, and interrogated over a period of about two and one-half hours by Police Detective Sergeant Bunting and two other officers. At that time, Edwards gave an alibi statement, which was tape recorded and ultimately received in evidence at his trial. He then spoke with the detectives about making a deal, and said that he would wait to make a deal until he had spoken to an attorney. At a pre-trial motion to suppress Marmion's testimony of a confession the next day, the trial judge concluded that the statements by Edwards on the evening of his arrest constituted a claim of the right to consult counsel before making any statements. On Appeal, the Arizona Supreme Court agreed that Edwards had invoked his Sixth Amendment right to consult with counsel before breaking his silence. The Arizona Supreme Court said that "looking at Edwards' statement in the context made, that . . . it must be interpreted as a request for counsel and as a request to remain silent until counsel was present". 594 P.2d at 77, Appendix A, infra.

Edwards was taken from the police station to the jail, where he was held in solitary confinement overnight. As the dissenting opinion below notes, the next morning a jail detention officer told Edwards that detectives were there to see him. Edwards told the officer that he did not wish to speak to anyone. The detention office told him that he had to. Appendix A, infra, 594 P.2d at 83. Edwards was thereupon taken to an interrogation room, where Detectives Marmion and Milne were waiting to question him, "knowing that an attorney would not be appointed for him until the afternoon". Appendix A, infra, 594 P.2d at 83.

The Arizona Supreme Court noted that these detectives, although from the same section as Detective Bunting who had questioned

Edwards the day before, did not know that he had made the statement about an attorney. But Bunting, to whom the request had been made, had instructed Detective Milne to go to the jail to interview Edwards. II P 58.[2]

Edwards was read his Miranda rights at the jail interrogation, and when asked at the supression hearing before trial why he had not once again told these detectives that he wanted an attorney, he responded: "I didn't think you had to keep asking for an attorney over and over and over." Appendix A, infra, 594 P.2d at 83. According to the detectives, Edwards then said that he would tell them anything they wanted to know, but did not want any such comments tape recorded, because he did not want the statement used against him. The detectives testified that they explained to him that even unrecorded, oral statements could be presented against him at trial, and that Edwards then made inculpatory statements.

After leaving the interrogation room, Detective Marmion tape recorded his recollections of the interview, and thereafter testified at the trial, that Edwards had confessed.

On the afternoon of the day that Edwards had been interrogated at the jail over his objections, he was appointed counsel at his initial court appearance. Three or four days later, the detectives went back to the jail to attempt to obtain a statement from Edwards, but he declined to say anything.

At the suppression hearing the trial court initially suppressed the confession, holding that Edwards had exercised his rights to remain silent and to have advice of counsel before making any statements, and that this decision had not been scrupulously honored by the police, nor had these rights been waived. V M 39-41. Three days later, the Court

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[2] Reference is to the record that was before the Arizona Supreme Court, which included many volumes of trial transcript from both the first and second trial as well as photostated pleadings and instruments filed with the trial court. Abbreviations are explained in Appendix E to this Petition.

changed its mind, on the basis of an Arizona opinion that had not been earlier cited to him, and concluded that this Court's opinion in Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321 (1975) permitted the police conduct that obtained the confession.

On appeal, Edwards reasserted his Fifth and Sixth Amendment claims that the confession should have been suppressed, which had first been raised at the pre-trial suppression hearing. As has been noted, the Arizona Supreme Court agreed that Edwards had invoked his rights to remain silent and to have counsel before making further statements, on the evening of his arrest. Over dissent, however, it concluded that these rights were voluntarily and knowingly waived, and that the confession was therefore properly admitted.

Edwards chose to represent himself and conduct his own defense. It took two trials to convict him; there first having been a mistrial when the jurors could not reach a verdict.

At the beginning of the second trial, Edwards objected to being "in front of the jury in slippers and jailhouse clothes presenting the case to them". I Tr 9, 10. Edwards had been incarcerated in the Pima County Jail ever since his arrest on January 19, 1976. During the first trial Edwards had been provided with "civilian" clothing which he advised the Court, at the beginning of his second trial, the Sheriff's officers at the jail had either lost or misplaced.

Later in the same, first day of the trial, Edwards reiterated his objection to being tried in jailhouse clothes, saying, "They [the jury] know, if they have been in Arizona a long time, they know jailhouse clothes and I would not like to be presiding in the courtroom with jailhouse clothes. I think they would preclude [conclude] from some kind of reasoning. I think that would be a prejudicial factor to me." I Tr. 73. The judge perceived the problem, suggesting that perhaps clothing from the Salvation Army ought to be obtained. Id. at 74. At the time of Edwards' comment,

the State made no objection, nor voiced any disagreement with Edwards' description of his clothing as being jailhouse clothes that the jurors would recognize as such.

On appeal, Edwards urged in his brief that the presumption of innocence, guaranteed to him by the Fourteenth Amendment Due Process Clause, was violated by his trial in prison garb. The State contended that Edwards should have continued to object and establish a record that he remained in prison garb during the rest of the trial. The Arizona Supreme Court found no error, saying, "There is no indication in the record that Edwards' prison clothes were identifiable as such". Appendix A, infra, 594 P.2d at 81.

Like many states, Arizona has a system of pre-trial discovery and disclosure by which the defendant is obliged to apprise the State of witnesses he intends to call, and defenses he intends to invoke, after the State has made certain disclosures of its own case. Edwards timely disclosed an alibi defense, although all but one of his alibi witnesses were unlocatable due to the delay in bringing him to trial. The discovery procedures for Arizona criminal cases are found generally in Rule 15.2, et seq. of the Arizona Rules of Criminal Procedure, Volume 17, Arizona Revised Statutes Annotated. Rule 15.2 requires that the defendant provide the prosecutor with written notice of defenses to be invoked and witnesses to be called for each defense, all to be done within twenty days after the arraignment in the Superior Court. Rule 15.7 lists five sanctions that are available to the Court for failure by a party to comply with the disclosure and discovery rules. They include ordering disclosure of the information, granting a continuance, invoking contempt powers against the party or counsel, preclusion of witness' testimony, and declaring a mistrial when necessary to prevent a miscarriage of justice.

During the second trial, on the morning of April 22, 1977, Edwards advised the Court and the prosecutor that he was then disclosing

a defense witness, who would testify that Edwards had been extremely intoxicated at a party Campbell attended, at 6:00 p.m. on the evening when the robbery occurred. The prosecutor immediately objected that the disclosure was untimely. The Court ordered the witness to be made available for an interview by the prosecutor, and it was conducted at the lunch break. The prosecutor and one of his investigators recorded a fifteen minute interview with Mr. Campbell on Friday. IV Tr. 6-7. Three days later, on 25 April, the Court accepted an offer of proof from witness Campbell, heard argument on the State's request to preclude the witness, and imposed the sanction of preclusion. Edwards argued that the State had had an opportunity to investigate the proposed testimony of the witness, saying, "This is my defense. . .I think he will tell you about my whereabouts and then I have him as a credible witness and I have Mrs. Dolores to testify about my whereabouts after 6:00. This is the main factor in my case and the main credible witness that I will present to the court in my defense." IV Tr. 12. The State made no motion for a postponement, nor did the Court consider any other sanction.

On appeal, Edwards contended that preclusion of the witness violated his Sixth Amendment right to call witnesses, on the ground that there was no showing made of the need for such a severe sanction as preclusion. The Arizona Supreme Court, although recognizing that the testimony of Campbell was probably admissible, held that Campbell's preclusion did not prejudice Edwards to the extent that he was denied a fair trial, and therefore found no error.

Edwards' confession figured prominently in the summation of the case. At the beginning of his, the prosecutor wrote on an easel board, for the jury to view, the words "Defendant Confessed". At the beginning of his closing argument, Edwards then wrote on the easel board "The defendant did not confess". He then proceeded to argue the inferences available from the evidence in the record. The Arizona Supreme Court concluded

that statements about defendant not having confessed were made by Edwards without support in the record, but that was clearly not so.

Indeed, the prosecution's brief to the Arizona Court, on page 15, recognizes that Edwards was doing no more than arguing inferences from the evidence in the record, as his counsel would have been perfectly proper in doing had counsel instead of Edwards been doing the summation.

For example, Edwards argued that because the two interrogating detectives, Marmion and Milne, only gave testimony of an oral confession, and had no evidence of a written confession, the jury should conclude that Edwards did not confess and should "take that into what we call into consideration, into evidence". V Tr. 111, 127, 128. He also referred to the alibi statement that was admitted into evidence, saying "[a]s you heard in my statement, I was at a party" by which as the State acknowledged he was referring to the taped statement.

In his rebuttal argument, the prosecutor then made the following comments, which were interrupted by motions for a mistrial by the defense on the grounds that they constituted an impermissible comment on Edwards' failure to take the stand. The prosecutor said:

> "What evidence is there that he did not confess? Did any witness come in here and say on the witness stand under oath that there was no confession, there was no confession and the police are lying, there was no confession? That incident never occurred. This incident never occurred.
>
> No, ladies and gentlemen, nobody testified to that. No witnesses were called that testified about that confession being made. No witnesses whatsoever." V Tr. 138139.
>
> * * *
>
> "The most conclusive statement is his own statement. He never said he didn't confess other than writing it on the easel.
>
> He told you he wasn't involved in the crime, he wasn't guilty. Here he told you that like I'm telling you, like I'm talking to you, not under oath.

> I think you have to consider all the evidence in this case before you make up your minds about the case." V Tr. 147.

The Court denied two motions for a mistrial on the grounds that these comments drew the jury's attention to Edwards' failure to take the stand and testify. V Tr. 140, 148.

On appeal, Edwards argued that his Fifth Amendment right to remain silent was violated by these comments, but the Arizona Supreme Court held that the prosecutor's statements were invited by Edwards' error and therefore not grounds for reversal. This ruling was predicated on the erroneous misapprehension that there was no evidence in the record from which one could argue that Edwards had not confessed.

Edwards' conviction came 14 months after his arrest. Before the trial, the indictment had been dismissed because of irregularities in the Grand Jury proceedings. The State chose to spend four months appealing that ruling, rather than to have Edwards reindicted, which could be done (and which ultimately was done) within a matter of days. After being reindicted, Edwards filed Motions to Dismiss for Violation of His Rights to a Speedy Trial, on September 7, 1976 (R. 24) and on January 5, 1977 (R. 52(b)). He also filed a Notice of Impending Expiration of Time Limit, a pleading required by the Arizona Criminal Procedure Rules, to apprise the Court that deadlines created by State procedure were about to expire. As part of his motions on speedy trial grounds, Edwards provided an affidavit of an investigator that three alibi witnesses had been lost track of because of the time delay. (R. 37.) One of the alibi witnesses was ultimately located, but gave only hazy testimony at best. On appeal, the Arizona Supreme Court agreed that Edwards did adequately and repeatedly assert his right to a speedy trial, Appendix A, infra, 594 P.2d at 80. It concluded, however, that there was insufficient showing of prejudice because he could not prove that the loss of the alibi witnesses was caused by the delay. Of the fourteen months between arrest and ultimate trial, the Court

concluded that only four months were caused by the State. (Edwards had filed two motions for postponement when he was unable to locate his alibi witnesses.)

After the first trial resulted in a hung jury, Edwards was immediately retried, and ultimately convicted on felony murder, robbery and burglary counts. He was originally sentenced to death, but after appeal, and remand for resentencing on the capital count, he was sentenced to life imprisonment on the felony murder count. The Supreme Court affirmed the convictions, and Edwards' convictions and sentence have become final.

REASONS FOR GRANTING THE WRIT

The opinion of the Arizona Supreme Court sanctions a conviction that depended in great part upon an intentional deprivation of Edwards' right to counsel at the one most critical stage when it was needed - when his confession was being sought. It allowed the fact that he served as his own counsel and made his own final argument to be used to penalize him for failing to take the stand. In both instances the opinion of the Arizona court squarely conflicts with cases of this Court interpreting the constitutional guarantees claimed by Edwards. Other errors of the Arizona court in precluding witnesses, forcing Edwards to trial in prison garb, and delaying Edwards' trial, all conflict with cases of this Court recognizing these matters as critical in deciding whether a defendant was afforded a fair trial.

1. The confession obtained before counsel was furnished.

Edwards is an indigent, and was at the time of his arrest. The facts of this case present a familiar pattern and, if undisturbed, a distressing precedent for conduct by arresting officers during that period between arrest and the initial court appearance when a lawyer will normally be appointed for indigent defendants.

In this case, Detectives Milne and Marmion knew that if they did not get out to the jail and interrogate Edwards in the morning, he

would have counsel appointed at 1:30 p.m. that same afternoon. Thereafter, prospects for getting a statement were dim, as was demonstrated by the lack of results when Marmion revisited Edwards several days later. Edwards was in custody under the authority of a warrant charging him with felony murder. The purpose of the interrogation, therefore, was to develop trial evidence and not to determine who the perpetrator of the offense was. The interrogation was planned to occur before the State could, in the normal prosecutorial procedures, fulfill its obligation to allow Edwards to consult counsel as he had chosen to do.

The Arizona Court simply did not recognize that different principles flow from Miranda for those instances where an accused has claimed his right to counsel, before further custodial interrogation, then apply for waivers of a previous decision simply to remain silent. This Court said in Miranda:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

That principle has been reiterated often, in the thirteen years since Miranda was decided. E.g., Michigan v. Mosley, 423 U.S. 96, 101, n. 7 (1975). ("[Mosley] does not involve the procedures to be followed if the person in custody asks to consult with a lawyer"); Brewer v. Williams, 430 U.S. 387 (1977); Fare v. Michael, C., ____ U.S. ____, (78-334 6/20/79) ("[T]he Court fashioned in Miranda the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.").

In the kind of situation found in this case the police have intentionally frustrated Edwards' decision to get legal advice before speaking further with them. They immediately opened a new interrogation

before he could speak to his lawyer. As Mr. Justice Stevens has written in another case:

> "The sole purpose of the visit was to obtain evidence for use at the trial. Accepting the prosecutor's evidence as true, defendant's participation in the crime had already been established and, therefor, no further investigation was necessary. The work of the agents was trial preparation, pure and simple.
>
> In a civil context I would consider this behavior unethica. and unfair. In a criminal context I would regard it as such a departure from 'procedural regularity' as to violate the due process clause of the Fifth Amendment. If the evidence of guilt is as strong as the prosecutor contends, such direct communication is all the more offensive because it was unnecessary. If there is doubt about defendant's guilt, it should not be overcome by a procedure such as this. United States v. Springer, 460 F.2d 1344, 1354, 55 (7th Cir. 1972) (Stevens, J. dissenting).

Chief Justice Burger, writing as a Circuit Judge, concluded that post-arrest interrogations of an accused who has counsel are prohibited by Miranda unless counsel has been given an opportunity to be present. Mathies v. United States, 347 F.2d 312, 316 n. 3 (D.C. Cir. 1967) (Burger, J.).

The Courts of Appeal have divided on the question whether this Court meant what it said in Miranda, that when an accused claims his right to counsel before further questioning, all questioning must cease until counsel is provided. Compare, United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978), cert. den., 436 U.S. 919 (although government's "burden is greater . . . to show a waiver after the right to counsel has been asserted than . . . a waiver of the right to remain a silent," there is no "blanket prohibition against further questioning") with, Nash v. Estelle, 560 F.2d 652, 656 (5th Cir. 1977), rehearing en banc granted 560 F.2d 660; United States V. Priest, 409 F.2d 491 (57th Cir. 1969) ("where there is a request for an attorney prior to any questioning . . . a finding of knowing and intelligent waiver of the right to an attorney is impossible").

The Circuits have also divided over the question of whether an accused can be interrogated after he has been appointed counsel and consulted with him, without letting that counsel know of the planned interview. Compare, United States v. Thomas, 474 F.2d 110 (10th Cir. 1973) (holding that once a defendant has an attorney, statement obtained by interview may not be offered unless accused's attorney was notified of interview and given a reasonable opportunity to be present); United States v. Riencke, 416 F.2d 69 (2nd Cir. 1969) (statement excluded because interrogator persisted in questioning even though he knew accused was waiting for an attorney to speak with him); with, Coughlan v. United States, 391 F.2d 371 (9th Cir. 1976); Wilson v. United States, 398 F.2d 331 (5th Cir. 1968) (criticizing interrogation of accused who had counsel, without counsel knowing of it, but permitting a finding of waiver). This Court has noted the circuit conflict, but has not been obliged to resolve it. Brewer v. Williams, 430 U.S. 387, 406, n. 11 (1977) (finding no waiver of right to counsel, therefor not reaching the matter of whether it can be waived without counsel knowing of the interrogation).

This is perhaps a case like Brewer, in that no waiver of the previously claimed right to counsel can be found on this record. Edwards was held in solitary confinement overnight, told he must speak with his interrogators, said that he did not at that point reiterate his request for counsel because he didn't think you had to do it "over and over and over", and said he would speak but wanted no statement used against him and therefor would give no recorded statement. There was surely no knowing, intelligent, voluntary choice demonstrated, during the hurried interrogation, which can be said to establish a waiver by Edwards of his rights to consult counsel and remain silent.

This cause should be taken so that the divisions among the Courts of Appeal can be resolved, as to whether police can, themselves, renew attempts to obtain statements after an accused has either asked for

counsel (and not gotten it) or has obtained counsel but the police secretly seek to get the accused to change his mind about giving them a statement. It presents a fairly typical fact pattern - an accused, electing to consult counsel, having to wait for a time, perhaps up to twenty-four hours before counsel is appointed for him at a first court appearance, and police attempting to intervene and obtain statements within that time.

The rule accepted by the Arizona court, agreeing with the Ninth Circuit, squarely conflicts with what was said in Miranda, and this Court's reaffirmation in Michigan v. Mosley, 423 U.S. 96 (1975), that if an individual states during questioning that he wants to consult with an attorney, interrogation must cease until an attorney is present, and that these procedures are different from those in which an individual simply asks to remain silent. 423 U.S. at 101, n. 7 and at 104 n. 10.

As Justice White noted in his concurrence in Mosley, there are reasons to keep lines of communicaton open between authorities and the accused when the accused chooses to remain silent, which are not present when the accused has instead chosen to obtain legal advice. In the latter circumstance, authorities may communicate with the accused through the attorney. Where the accused has expressed a preference to consult an attorney, he thereby indicates his own feeling that he cannot competently deal with authorities without legal advice, and "a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism". 423 U.S. 98 at n. 2.

2. Trial in Prison Garb.

This Court has held in Estelle v. Williams, 425 U.S. 501 (1976) that an accused cannot be compelled to go to trial in prison clothing, lest the jury regard him as likely to be guilty. The Court also concluded, however, that some might deem a trial in prison garb a way to elicit sympathy from a jury, and therefore, elect to be tried that way. Accordingly, before error can be claimed, an objection must be made to being tried in

jail clothing. Rather than to disagree with this analysis, however, the Arizona court chose to misapply the facts, and conclude that there was no showing that Edwards was in identifiable prison garb.

Edwards stated on the record that he was in prison clothing and that jurors would view him as such. The judge agreed, discussing the obtaining of "civilian clothes" from the Salvation Army. And the State did not disagree with the characterization by Edwards that he was in prison clothes that the jury would recognize as such. Indeed, on appeal the State only contended that Edwards should have made continuing objections to each day's trial in prison clothing, which is of course completely inconsistent with the effect that being once viewed in prison clothing would have on the presumption of innocence.

This Court should grant review because of the square conflict between the opinion of the Arizona Court in this case, and that of this Court in Estelle, supra.

3. The invocation of the overly harsh sanction of preclusion.

The Sixth Amendment affords every defendant compulsory process to aid his defense. Parenthetically, the prosecution has no corresponding constitutional right, although of course State procedures furnish compulsory process for the prosecution. The Arizona discovery rules allow a court to preclude calling of a witness, where the name of that witness was not timely disclosed.

Arizona has consistently overruled defendants' objections to the prosecution calling witnesses whose names were not disclosed, unless the defense has sought a postponement of the trial. E.g., State v. Ford, 108 Ariz. 404, 499 P.2d 699 (1972); State v. Chitwood, 73 Ariz. 161, 239 P.2d 353 (1951).

In this case, the prosecution did not seek a postponement; indeed three days were available to check out the witness' testimony after the prosecuting lawyer and his investigator took a tape recorded statement.

But the Arizona Court applied the preclusion sanction more harshly in derogation of the Sixth Amendment right of a defendant, than it does against the State.

This Court has not addressed the balance between the Sixth Amendment rights of a defendant to compulsory process, and the interest of the State in a system of pre-trial disclosure, beyond holding that such a system can be constitutional, Williams v. Florida, 399 U.S. 28 (1970), so long as it is reciprocal. Waridus v. Oregon, 412 U.S. 470 (1973). Under the application of the compulsory process clause explicated in Washington v. Texas, 388 U.S. 14 (1967), it seems plain that unduly heavy handed imposition of sanctions, particularly those that completely prevent obtaining testimony that the Supreme Court of Arizona itself concluded was probably admissible, present a substantial question that this Court ought to address.

4. The Arizona Court utilizing the constitutional right of a defendant to conduct his own defense, as justification for comment upon his failure to take the stand.

This Court has recognized that a defendant has a Sixth Amendment right to conduct his own defense. Faretta v. California, 422 U.S. 806 (1975). It of course takes no extended exegesis of cases from this Court or elsewhere, to recall that a prosecutor cannot make statements during his summation that are calculated to draw attention to the failure of a defendant to testify, or that would have such effect. E.g., Griffin v. California, 380 U.S. 609 (1965).

The Arizona Court blithely concluded that Edwards had no evidence from which he could conduct a final argument challenging the prosecutor's assertion that he had confessed. Such simply was not the case. Arizona cannot be allowed to use such a state procedure rule as "invited error", where the record does not even support it, to override so well established a Fifth Amendment Right.

The repeated, emphatic, reminder to the jury that Edwards had not ascended the witness chair cannot be countenanced. If conducting one's own defense and arguing the inferences from the evidence in a way that a lawyer would do invites that "error" as the Arizona Court thought, it is so as much when counsel makes arguments and draws inferences from the evidence, as when the defendant does so. And it would unduly erode the right of a defendant to represent himself. The matter is quite likely to reoccur, and squarely conflicts with the principles espoused by this Court in Farreta and Griffin.

CONCLUSION

The affirmance of Edwards' conviction by the Arizona Court squarely contravenes several cases of this Court. It exults form over substance in constitutional rights, by blinking the intentional frustration of Edwards' claim to a lawyer, at the arrest stage, and callously penalizing his decision to conduct his own defense, and doing so in a fully effective way. Edwards' trial can only be called "fair" by ignoring decisions of this Court on the presumption of innocence, the right to call witnesses, and guaranting a speedy trial. For these reasons it is respectfully requested that this Court grant Certiorari.

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MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
Of Counsel

STATE of Arizona, Appellee,
v.
Robert EDWARDS a/k/a Willie Barefield, Appellant.
No. 3957.
Supreme Court of Arizona,
En Banc.
March 27, 1979.
Rehearing Denied May 1, 1979.

Defendant was convicted in the Superior Court, Pima County, Cause No. 30683, Ben C. Birdsall, J., of robbery, burglary and first-degree murder, and he appealed. The Supreme Court, Hays, J., held that: (1) defendant's statement that he wanted to talk to an attorney before making a deal was sufficient as request for counsel and as request to remain silent until counsel was present; (2) finding that defendant's statement was voluntarily and knowingly made was not clearly and manifestly erroneous; (3) rule governing waiver of rights to counsel did not require that waiver of defendant's right to attorney at custodial interrogation be in writing or before the court; (4) since speedy trial limits began again following reindictment, and there was no violation prior to reindictment and no allegation of violation subsequent to reindictment, rule governing speedy trial was not violated; (5) where State did everything they could to locate witnesses, and defendant did not show that witnesses would have been available without delay caused by State, defendant was not unduly prejudiced as result of trial delay; (6) defendant was not prejudiced by preclusion of witness to such an extent that he was denied fair trial; (7) death of victim from heart attack which occurred during robbery could form basis of felony-murder conviction, and (8) where defendant was sentenced pursuant to portion of statute which was held unconstitutional, murder conviction was remanded for resentencing.

Affirmed in part and remanded for resentencing in part.

Gordon, J., dissented and filed opinion.

1. Criminal Law ⇐412.2(5)

Miranda was not intended to require that every reference to an attorney, regardless of its ambiguity, be construed as invocation of *Miranda* rights; statement must be examined in context made to determine whether it was sufficiently clear to be fairly interpreted as request for attorney or demand that interrogation cease.

2. Criminal Law ⇐412.2(5)

Defendant's statement that he wanted to talk to an attorney before making a deal was sufficiently clear to be interpreted as request for counsel and request to remain silent until counsel was present.

3. Criminal Law ⇐412.2(1)

Although *Miranda* requires that questioning cease after defendant asks for an attorney, it does not preclude defendant from changing his mind either on his own or in response to inquiry by police so long as decision is voluntarily made.

4. Criminal Law ⇐412.2(1)

Goal of *Miranda* is to insure that right to an attorney and right to remain silent are not reduced to meaningless phrases as result of overzealous police practices.

5. Criminal Law ⇐412.2(5)

Miranda does not create per se rule precluding defendant from initiating further discussions with police or from responding to subsequent inquiries from police after right to attorney had been invoked so long as waiver of such right is otherwise voluntary.

6. Criminal Law ⇐531(3)

Confessions are prima facie involuntary and burden is on State to show by preponderance of evidence that confession was freely and voluntarily made.

7. Criminal Law ⇐519(1)

In determining voluntariness of confession, trial court must look to totality of the circumstances surrounding confession and decide whether defendant's action is know-

APPENDIX A

ing and intelligent and whether his will has been overborne.

8. Criminal Law ⇐1158(4)

Finding by trial court that confession is voluntary will not be upset on appeal in absence of clear and manifest error.

9. Criminal Law ⇐414

In prosecution for robbery, burglary and murder, finding that defendant's statement to police was voluntarily and knowingly made was not clearly and manifestly erroneous.

10. Criminal Law ⇐412.2(5)

Rule of criminal procedure governing waiver of rights to counsel was not intended to require judicial presence and written waiver of counsel before custodial interrogation. 17 A.R.S. Rules of Criminal Procedure, rule 6.1(c).

11. Criminal Law ⇐412.2(5)

Rules of criminal procedure governing waiver of rights to counsel did not require that waiver of defendant's right to attorney during custodial interrogation be in writing or before the court. 17 A.R.S. Rules of Criminal Procedure, rule 6.1(c).

12. Criminal Law ⇐577.8

Where there was stay in effect during period of appeal by State from granting of motion for redetermination of probable cause in prosecution for robbery, burglary and murder, such stay necessarily halted all proceedings in the trial court and such period was excluded time under speedy trial rule. 17 A.R.S. Rules of Criminal Procedure, rule 8.1 et seq.

13. Criminal Law ⇐577.12(1)

Where there was no showing that State's action in appealing grant of motion for redetermination of probable cause was frivolous or taken in bad faith with intent to delay defendant's trial, limiting options available to State would have been wholly inappropriate, and thus State was not required to reindict defendant rather than seeking appellate relief and period of delay which resulted from appeal by State was not included in time period for purpose of speedy trial rule. 17 A.R.S. Rules of Criminal Procedure, rule 8.1 et seq.

14. Criminal Law ⇐577.14

In light of fact that speedy trial limits began anew following reindictment, defendant was not denied speedy trial in violation of rule where no violation occurred prior to reindictment on charges of robbery, burglary and murder, and there was no allegation of subsequent speedy trial violation. 17 A.R.S. Rules of Criminal Procedure, rule 8.1 et seq.

15. Criminal Law ⇐577.10(1)

Inquiry into possible violation of constitutional right to speedy trial focuses upon four factors: length of delay; reasons for delay; defendant's assertion of right, and prejudice caused defendant; of such factors, the first is least important while the last is most important. U.S.C.A.Const. Amend. 6.

16. Criminal Law ⇐577.15(4)

Although 14-month delay between indictment and trial appeared to be excessive, such delay was not prejudicial per se for purposes of determining violation of constitutional right to speedy trial. U.S.C.A. Const. Amend. 6.

17. Criminal Law ⇐577.10(10)

In prosecution for robbery, burglary and murder, defendant adequately and repeatedly asserted right to speedy trial for purposes of determining whether 14-month delay between indictment and trial constituted denial of constitutional right to speedy trial. U.S.C.A.Const. Amend. 6.

18. Criminal Law ⇐577.10(6)

Where court and State did everything they could have done to locate two alibi witnesses for defense, and defendant did not show that witnesses would have been available without delay caused by State, defendant was not unduly prejudiced as result of delay in prosecution for robbery, burglary and murder.

19. Criminal Law ⇐1144

Where record is silent, missing facts will be presumed to support conviction.

20. Criminal Law ⇐629

Where defendant was aware of witness and intoxication defense long before trial, but disclosed neither to the State, exclusion of witness as sanction for nondisclosure was not abuse of discretion. 17 A.R.S. Rules of Criminal Procedure, rule 15.7.

21. Criminal Law ⇐1166(1)

Testimony that witness saw defendant intoxicated some seven hours before crime, although probably admissible, was not so dispositive that its absence denied defendant fair trial; thus, defendant was not prejudiced by preclusion of witness to such extent that he was denied a fair trial. 17 A.R.S. Rules of Criminal Procedure, rule 15.7.

22. Criminal Law ⇐726

In closing argument, defendant's oral and written statements before the jury asserting that he had not confessed were improper as they were wholly unsupported by the evidence; thus, any error in prosecutor's statements made in response to defendant's argument was error invited by defendant, and defendant could not raise error which he invited hoping to benefit thereby.

23. Homicide ⇐5

Death of victim from heart attack which occurred during robbery could form basis of felony-murder conviction, notwithstanding that such death was unintended and accidental.

24. Criminal Law ⇐1209

Conviction and sentence for robbery, burglary and felony-murder on basis of death of victim from heart attack which occurred during robbery did not violate double punishment statute. A.R.S. § 13–1641 (Repealed).

25. Homicide ⇐236(1)

Evidence in prosecution for felony-murder, including testimony of pathologist that, in his expert opinion, death of victim resulted from heart attack induced by anxiety resulting from being robbed at gunpoint, was sufficient to support causation element.

26. Criminal Law ⇐1188

Where defendant was sentenced pursuant to portions of statute which was held unconstitutional, murder conviction was remanded for resentencing. A.R.S. § 13–454, Laws 1973, ch. 138.

Bruce E. Babbitt, former Atty. Gen., Robert K. Corbin, Atty. Gen., by William J. Schafer, III, and Crane McClennen, Asst. Attys. Gen., Phoenix, attorneys for appellee.

Molloy, Jones, Donahue, Trachta & Childers by Michael J. Meehan, Tucson, attorneys for appellant.

HAYS, Justice.

This is an appeal by Robert Edwards from his convictions of robbery, burglary, and first degree murder, and from his sentence of death for the murder conviction. We have jurisdiction pursuant to article 6, § 5 of the Arizona Constitution and A.R.S. § 13–4031. We affirm the convictions and sentences for robbery and burglary, and the murder conviction, but remand the murder conviction for resentencing.

We are presented with nine issues on appeal:

1. Whether Edwards' confession was admissible;
2. Whether, in deference to Edwards' right to a speedy trial, the state must forego its right to file a special action when a speedier alternative is available;
3. Whether Edwards' right to a speedy trial was violated;
4. Whether Edwards's trial in prison garb, over his objection, violated his right to due process;
5. Whether the preclusion of a defense witness was an abuse of discretion;
6. Whether the prosecutor's statements in his closing argument constituted an impermissible comment on Edwards' failure to take the stand;
7. Whether an unintended or accidental death may be the basis for a felony murder conviction;

8. Whether A.R.S. § 13–1641 (now renumbered as § 13–116) precludes conviction and punishment for robbery and burglary in addition to first degree murder when the latter is a felony murder; and
9. Whether there was sufficient evidence of causation in the record to support the felony murder conviction.

In October, 1974, a bar in Tucson was robbed at gunpoint. During the robbery the proprietor suffered a fatal heart attack. After obtaining some money and valuables the robbers fled. The police investigated the crime but soon exhausted all leads. In January, 1976, they obtained information that led to the arrest of Edwards and several co-conspirators. Edwards was subsequently convicted of robbery, burglary, and first degree murder.

CONFESSION

Edwards was arrested at his home at 4:00 P.M. He was not read the *Miranda*[1] warnings at that time nor did he make any statements, but was taken to the police department where he was read his rights. He indicated he understood them and that he would submit to questioning. After again having his rights explained to him, he was interrogated by a detective who told him that a co-conspirator had implicated him in the robbery of a Tucson bar. Edwards denied involvement and gave a taped alibi statement, at the beginning of which he was again read his rights. After the statement, he asked the detective if he could make a deal. The detective replied that he wanted a statement but that he could make no deals. Consequently, Edwards asked to talk to the county attorney about making a deal, which he was allowed to do. The negotiations were unsuccesaful. Edwards then reapproached the detective about a deal. The detective repeated his earlier statement that he could make no deals, to which Edwards replied, "I want an attorney before making a deal." He did not indicate, however, nor did the detective interpret his statement to mean that he wanted an attorney before further interrogation or that he wished to remain silent thereafter. The detective, nevertheless, ceased questioning immediately after Edwards' statement at about 6:30 P.M. Thereafter, Edwards was taken to the county jail.

At 9:15 the next morning two other detectives arrived at the jail and asked to see Edwards. Although they were from the same section as the detective who had questioned Edwards the day before and knew that he had been questioned, they did not know that he had made the statement about an attorney. When the detention officer told Edwards that the detectives were there to see him, he told the officer that he did not wish to speak to anyone. The officer told him that he had to. Edwards was thereupon taken to see the detectives. They identified themselves and said they wanted to talk to him. At that point they explained to him that he had the right to remain silent and the right to an attorney and the other *Miranda* rights. Edwards said that he was willing to talk to them but that he first wanted to hear the taped statement of his co-conspirator that the detective had told him about the day before. After a portion of the tape was played, he told the detectives that he would make a statement but that he did not want it recorded because it could be used against him in court. The detectives thoroughly explained that whether or not the statement was recorded did not matter because an oral statement could also be used against him in court. Edwards replied "I'll tell you anything you want to know, but I don't want it on tape." Edwards then gave a statement indicating his involvement in the robbery. The interrogation concluded at 10:30 A.M. Prior to trial, Edwards moved to suppress the confession and a hearing was held. The court found that the statement was voluntarily given but that the detectives violated *Miranda* when they reapproached Edwards after his statement about an attorney. However, the next day the judge reversed his ruling based on *State*

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

v. Travis, 26 Ariz.App. 24, 545 P.2d 986 (1976), and found the confession to be admissible substantively.

Edwards claims on appeal that he exercised both his right to an attorney and his right to remain silent, that he did not subsequently waive either right, and that in any case his statement was not intelligently made and was therefore involuntary. First, we must determine whether, having initially waived his rights, Edwards adequately reclaimed them by declaring that he would wait to talk to an attorney before making a deal.

Invocation of Previously Waived Miranda Rights

Miranda v. Arizona, 384 U.S. 436, 444–45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706–07 (1966), holds that if a defendant indicates "in any manner" that he wishes an attorney before speaking or that he does not wish to be interrogated further, questioning must cease. Edwards points to this language in *Miranda* and argues that his statement was adequate to raise both his right to an attorney and his right to remain silent.

The state argues, however, that by stating he wanted to see an attorney before making a deal, Edwards was not raising his right to an attorney as such, nor saying that he wished to remain silent, but only asserting that he wanted to see an attorney before talking anymore about a deal. For this proposition, the state relies on *State v. Travis, supra*. There, after the defendant had been arrested and read his rights, he made equivocal statements about desiring an attorney. A detective asked him if he would submit to a breathalyzer test and allow the interview to be recorded. The defendant responded that he wanted to seek the advice of counsel before granting either request. The detective then told him that his wife had died and that he would now be charged with first degree murder. The defendant broke down and confessed his involvement. In ruling that his confession was admissible, the court reasoned that the defendant never made a definite statement to the effect that he either wanted to talk to an attorney before answering questions or preferred that questioning cease. *Id.* 26 Ariz.App. at 29, 545 P.2d at 991.

[1] Notwithstanding the "in any manner" language of *Miranda*, *supra*, we are convinced that *Miranda* was not intended to require that every reference to an attorney, regardless of its ambiguity, must be construed as an invocation of the *Miranda* rights.[2] We think *Travis* is correct in looking at a statement in the context made and attempting to determine whether it is sufficiently clear to be fairly interpreted as a request for an attorney or a demand that interrogation cease. There is much authority in support of this view. *See, e. g., United States v. Rodriguez-Gastelum*, 569 F.2d 482, 484 (9th Cir.), *cert. denied*, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978); *United States v. Tokoph*, 514 F.2d 597, 605 (10th Cir. 1975); *United States v. Howard*, 152 U.S.App.D.C. 258, 259–60, 470 F.2d 406, 407–08 (1972); *State v. Knapp*, 114 Ariz. 531, 538, 562 P.2d 704, 711 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978); *State v. Gholson*, 112 Ariz. 545, 548, 544 P.2d 654, 657 (1976); *State v. Garrison*, 16 Or.App. 588, 519 P.2d 1295, 1300–01 (1974).

[2] Applying this reasoning in an evaluation of Edwards' statement, it appears at first blush that the state's argument is correct, *i. e.*, that Edwards was saying that he desired an attorney only if a deal was discussed further. However, looking at the statement in the context made, we find such an interpretation erroneous.

To accept the state's position in this case and allow Edwards' confession to stand while holding that he asked for an attorney for the limited purpose of making a deal would be illogical. Edwards wanted an attorney before making a deal. His part of

2. *Miranda* itself would seem to concede as much by indicating its approval of the policy of the Federal Bureau of Investigation that the initial decision as to whether, in an ambiguous statement, the defendant has asked for an attorney is for the agent on the scene. *See* 384 U.S. at 485–86 & n. 55, 86 S.Ct. at 1633–34 & n. 55, 16 L.Ed.2d at 729–30 & n. 55.

the deal would have been his confession. Therefore, to allow him to make a confession without counsel would be to deny him his right to counsel for the very purpose, albeit limited, for which it was invoked. Likewise, it would be just as illogical to hold that his statement was enough to invoke his right to remain silent only if questioned about a deal. We hold therefore, looking at Edwards' statement in the context made, that although it was equivocal, its meaning was sufficiently clear and therefore it must be interpreted as a request for counsel and as a request to remain silent until counsel was present.

We must now determine whether, after invoking his right to counsel and right to remain silent, Edwards waived them. Our discussion at this point is twofold: first, whether *Miranda* creates a per se rule against waiver of the right to an attorney or the right to remain silent after being invoked; and whether the waiver, if constitutionally permissible, was voluntary.

Per Se Rule Regarding Right to Attorney

[3-5] Edwards argues that *Miranda* creates a per se rule that once a defendant invokes his right to counsel he may not then be questioned again by police until an attorney is present. We do not agree. Although *Miranda* does require that questioning cease after a defendant asks for an attorney, we do not believe it precludes the defendant from changing his mind either on his own or in response to an inquiry by police so long as the decision is voluntarily made. We agree with the Ninth Circuit decision in *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.), *cert. denied*, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978), that per se rules often cause a court to lose touch with the purpose behind the rules. The goal of *Miranda* is to insure that the right to an attorney and the right to remain silent are not reduced to meaningless phrases as the result of overzealous police practices. 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. However, "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and *deprive suspects of an opportunity to make informed and intelligent assessments of their interests.*" (Emphasis added.) *Michigan v. Mosley*, 423 U.S. 96, 102, 96 S.Ct. 321, 326, 46 L.Ed.2d 313, 320 (1975). Reading *Miranda* to create such a per se rule would preclude a defendant, upon intelligent reflection, from voluntarily and knowingly acting as he thinks best. It would work to "imprison a man in his privileges." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280, 63 S.Ct. 236, 242, 87 L.Ed. 268, 275 (1942). We therefore hold, as did the Ninth Circuit in *Rodriguez-Gastelum, supra*, that *Miranda* does not create a per se rule precluding a defendant from initiating further discussions with police or from responding to subsequent inquiries from police after the right to an attorney has been invoked so long as the waiver is otherwise voluntary.

Per Se Rule Regarding Right to Remain Silent

Edwards also claims that *Miranda* creates a per se rule against questioning by police after the defendant has invoked his right to remain silent. We previously rejected this assertion in *State v. Hatton*, 116 Ariz. 142, 568 P.2d 1040 (1977), where the defendant, having invoked his right to remain silent, was twice reapproached by the police and interrogated. Citing *Michigan v. Mosley*, 423 U.S. 96, 102-03, 96 S.Ct. 321, 326, 46 L.Ed.2d 313, 321 (1975), for the proposition that *Miranda* cannot be interpreted to "'create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject,'" we held that the questioning of the defendant by police was permissible since the defendant's right to cut off questioning was scrupulously honored. 116 Ariz. at 146, 568 P.2d at 1044. We find *Hatton* controlling. Since, as in *Hatton*, Edwards was reminded of his *Miranda* rights and was asked by the detectives if he would voluntarily make a statement, we conclude that his right to cut off questioning was scrupulously honored.

Voluntariness of Waiver

[6-8] Finally, Edwards claims that his confession was involuntary since it was not knowingly made. In Arizona, confessions are prima facie involuntary and the burden is on the state to show by a preponderance of the evidence that the confession was freely and voluntarily made. *State v. Hall*, 120 Ariz. 476, 586 P.2d 1288 (1978). In determining the voluntariness of a confession, the trial court must look to the totality of the circumstances surrounding the confession and decide whether the defendant's action is knowing and intelligent and whether his will has been overborne. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 862 (1973); *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Once the court finds, as it did in this case, that the confession is voluntary, the finding will not be upset on appeal absent clear and manifest error. *State v. Edwards*, 111 Ariz. 357, 361, 529 P.2d 1174, 1178 (1974). We find no such clear and manifest error.

[9] Edwards claims that his comment "I'll tell you anything you want to know, but I don't want it on tape" reveals his misunderstanding of the use of the confession he gave and that therefore it was not knowingly given. The state argues that the admissibility of an oral statement was thoroughly explained and that he refused to have it recorded for reasons of his own, *i. e.*, because of the impression he received after just having listened to his co-conspirator's taped confession. In any case, recognizing that the trial court found that Edwards' statement was voluntarily and knowingly made, and applying the rules of law set out above, we cannot say that the court's finding was clearly and manifestly erroneous.

In conclusion, we find that Edwards did invoke his right to an attorney and his right to remain silent even though his statement was not altogether clear. We also find, however, that the question whether he waived them is not amenable to a per se rule and thus is left to the trial court whose decision must be guided by the rules for determining voluntariness. The trial court's finding that the waiver and confession were voluntarily and knowingly made is upheld.

Written Waiver Requirement

Edwards claims that even if he did waive his *Miranda* rights, 17 A.R.S. Rules of Criminal Procedure, rule 6.1(c), indicates that a waiver of the right to counsel is ineffective unless made before a judge and in writing. We do not agree.

[10, 11] Although rule 6.1 can be read as Edwards reads it,[3] it was not intended to require judicial presence and written waiver of counsel before custodial interrogation nor have we ever required such in order for the defendant to waive his right to an attorney during custodial interrogation. *See, e. g., State v. Hall*, 120 Ariz. 476, 586 P.2d 1288 (1978); *State Ferguson*, 119 Ariz. 55, 579 P.2d 559 (1978); *State v. Arnett*, 119 Ariz. 38, 579 P.2d 542 (1978); *State v. Ramirez*, 116 Ariz. 259, 569 P.2d 201 (1977); *State v. Hatton*, 116 Ariz. 142, 568 P.2d 1040 (1977); *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908,

3. 17 A.R.S. Rules of Criminal Procedure, rule 6.1, provides in relevant part:

a. Right to be Represented by Counsel. A defendant shall be entitled to be represented by counsel in any criminal proceeding, except in those petty offenses such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty. The right to be represented shall include the right to consult in private with an attorney, or his agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

c. Waiver of Rights to Counsel. A defendant may waive his rights to counsel under (a) and (b), in writing, after the court has ascertained that he knowingly, intelligently and voluntarily desires to forego them. When a defendant waives his rights to counsel, the court may appoint an attorney to advise him during any stage of the proceedings. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

98 S.Ct. 1458, 55 L.Ed.2d 500 (1978); *State v. Jenkins*, 111 Ariz. 13, 522 P.2d 1090 (1974). We therefore hold that rule 6.1(c) does not require that a waiver of a defendant's right to an attorney at custodial interrogation be in writing or before the court.

SPEEDY TRIAL

Edwards raises two distinct arguments regarding his right to a speedy trial: first, that the state is required by 17 A.R.S. Rules of Criminal Procedure, rule 8, to forego use of a special action when another procedural option is available whether or not the trial proceedings have been stayed; and second, that the delay with its allegedly resulting prejudice denied him his sixth amendment rights.

Rule 8 Violation

Edwards was arraigned on January 23. On March 5, Edwards moved for a redetermination of probable cause. The court granted the motion on March 22 finding that the state had failed to reveal all exculpatory information in its possession to the grand jury, but also finding that the state had not acted in bad faith. At that point, the state could have reindicted Edwards or it could have challenged the trial court's ruling by special action. It chose the latter alternative by filing a motion to stay and a special action. The court of appeals granted the stay but denied relief and later denied a motion for rehearing. The state then petitioned this court for review which was denied on July 20. On July 30, Edwards was reindicted following a determination by the grand jury that probable cause existed.

Edwards argues that the state should simply have reindicted him pursuant to the trial court's order rather than seeking appellate relief and that since it chose the more time-consuming procedure, the resulting period of delay (about four months) should be included in the rule 8 speedy trial time periods time periods. We do not agree for two reasons.

[12–14] First, there was a stay in effect during the period of the appeal that necessarily halted all proceedings in the trial court. Such a period is excluded time under rule 8. *State v. Steele*, 23 Ariz.App. 73, 76, 530 P.2d 919, 922 (1975). Second, to require the state to employ the less time-consuming procedure when another is authorized by law would deprive the state of a legitimate remedy. Where, as here, there is no showing that the state's action was frivolous or taken in bad faith with intent to delay the defendant's trial, we think a rule limiting the options available to the state is wholly inappropriate. Computing the time involved while excluding the time taken by the appeal, the defendant had not, as of the date of his reindictment, been denied a speedy trial in violation of rule 8. Finding that no violation had occurred to that point, and noting that the speedy-trial limits begin again following reindictment, *State v. Soto*, 117 Ariz. 345, 348, 572 P.2d 1183, 1186 (1977), and since Edwards alleges no subsequent speedy-trial violation unless the earlier period is included, we find that rule 8 was not violated.

Sixth Amendment Speedy-Trial Violation

[15] Edwards alleges that he was denied his constitutional right to a speedy trial by his lengthy incarceration while awaiting trial. He was arrested on January 19, 1976 and finally went to trial on March 17, 1977, a delay of 14 months. In *State v. Soto*, 117 Ariz. 345, 572 P.2d 1183 (1977), we held that a delay of nine months was sufficient to trigger further inquiry into the trial delay. That inquiry focuses on four factors set out by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972):

1. The length of the delay.
2. The reasons for the delay.
3. The defendant's assertion of his right.
4. The prejudice caused the defendant.

Of these factors, the first is least important while the last is most important. *State v. Soto, supra.*

Delay

[16] A 14-month delay seems to be excessive, but without looking into the reasons for the delay, we cannot conclude that the delay was prejudicial per se.

Reason for Delay

Only four months of the 14-month delay was caused by the state. Edwards claims that the state should be chastised for using four months to appeal an order when it could have simply reindicted as it ultimately was required to do. He cites *United States v. Perry*, 353 F.Supp. 1235, 1237 (D.D.C.1973), as authority for his position. There, the court did criticize the prosecution for delaying trial, but because it had taken fourteen months for appeals which could have been completed in four (as they were here), not because the state had chosen to appeal. On the other hand, in *United States v. Osuna-Sanchez*, 446 F.2d 566 (9th Cir. 1971), *cert. denied*, 404 U.S. 1022, 92 S.Ct. 698, 30 L.Ed.2d 672 (1972), the court looked at the diligence of the prosecution in the appeal process and held that a six-month delay because of the appeal did not violate the defendant's right to a speedy trial.

Edwards attempts to distinguish *Osuna-Sanchez, supra*, and similar cases, *e. g., People v. Stewart*, 61 Mich.App. 167, 232 N.W.2d 347 (1975), that approve the use of interlocutory appeals by the state by pointing out that these cases involve appeals from trial court orders suppressing prosecutor's evidence and were therefore absolutely necessary to the prosecution's cases. We are not inclined to accept this distinction nor hold that the state's right to challenge an adverse trial court ruling by special action prior to a criminal trial is limited to those situations in which it is absolutely necessary, at least in the absence of any evidence in the record to show that the appeal was frivolous or taken in bad faith with the intent to delay the trial.

Defendant's Assertion of Right

[17] Although the state argues to the contrary, we find after examining the record that Edwards did adequately and repeatedly assert his right to a speedy trial.

Prejudice to Defendant

[18] Edwards claims that he was prejudiced by the delay because he was not able to locate two alibi witnesses essential to his defense. We do not believe the record supports Edwards' claim of prejudice for the following reasons. Edwards made no offer of proof to the court of the alleged testimony of the alibi witnesses had they been located. Nor did he show that the witnesses would have been available if the state had not delayed the trial for four months. He called one alibi witness in whose *sole* presence he claimed he was during the robbery. He was granted numerous continuances in order to locate the witnesses and the court issued several requests for attendance of witnesses to one state in which it was thought the witnesses were residing. The state had never interviewed the witnesses nor did it know where they lived.

Although we recognize that these witnesses may have aided Edwards at trial, we cannot say that their absence prejudiced him to such an extent that he was denied a fair trial. He is, after all, entitled to a fair trial, not a perfect one. *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476, 484 (1968). Since the court and the state did everything they could have done to locate the witnesses and since Edwards did not show that the witnesses would have been available without the delay caused by the state, we find that Edwards was not unduly prejudiced as a result of the delay. *See State v. Watson*, 114 Ariz. 1, 6, 559 P.2d 121, 126 (1976), *cert. denied*, 430 U.S. 986, 97 S.Ct. 1687, 52 L.Ed.2d 382 (1977); *Sigard v. State*, 537 S.W.2d 736, 739 (Tex.Cr.App.1976).

Edwards also alleges other bases for prejudice. We have reviewed these claims and find them equally without merit. Therefore, having considered all the factors required by *Barker v. Wingo, supra*, we conclude that Edwards' constitutional right to a speedy trial was not violated.

PRISON GARB

[19] Edwards claims he was denied the due process right to a presumption of innocence by being tried in prison garb, citing *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In *Estelle*, the Supreme Court held that an accused may not be compelled against his will to go to trial in identifiable prison garb. Edwards' reliance on *Estelle* is misplaced. *Estelle* deals with the case in which the defendant was tried in *identifiable* prison garb. There is no indication in the record that Edwards' prison clothes were identifiable as such. No effort was made by defendant to make an offer of proof as to the identifiable nature of his clothes. It is well-settled law in Arizona that where the record is silent, the missing facts will be presumed to support the conviction. *E. g., State v. Caldwell*, 117 Ariz. 464, 468, 573 P.2d 864, 868 (1977); *State v. Williams*, 113 Ariz. 442, 444, 556 P.2d 317, 319 (1976); *State v. Bojorquez*, 111 Ariz. 549, 553, 535 P.2d 6, 10 (1975).

PRECLUSION OF DEFENSE WITNESS

[20] During the trial, Edwards attempted to call a witness that would have testified that he was intoxicated at 6:00 P. M., the night before the robbery. Even though Edwards was aware of both the witness and the intoxication defense long before trial, neither had been disclosed to the state. The state objected not only because Edwards had known of the witness and of the new defense before trial and had not disclosed them, but also because it believed that testimony of intoxication at 6:00 P. M. was not relevant to the defendant's participation in a robbery at 1:00 A. M. the next morning, seven hours later. The court excluded the witness as a sanction for Edwards' nondisclosure. Edwards argues that exclusion of the witness was an abuse of discretion by the trial court. We disagree.

[21] We have repeatedly held that the imposition of a sanction pursuant to 17 A.R.S. Rules of Criminal Procedure, rule 15.7, is within the sound discretion of the trial court, and absent a showing of prejudice this court will not find an abuse of discretion. *State v. Ramirez*, 116 Ariz. 259, 268, 569 P.2d 201, 210 (1977); *State v. Clark*, 112 Ariz. 493, 495, 543 P.2d 1122, 1124 (1975). The prejudice must be such that the defendant has been denied a fair trial. *See State v. Dorow*, 116 Ariz. 294, 295, 569 P.2d 236, 237 (1977).

We do not believe that Edwards was prejudiced by the preclusion of the witness to such an extent that he was denied a fair trial. The testimony that he saw Edwards intoxicated some seven hours before the crime, although probably admissible, was not so dispositive that its absence denied Edwards a fair trial.

CLOSING ARGUMENT

[22] As the prosecutor began his closing argument he wrote on a chalk board, "Defendant confessed." At the beginning of Edwards' closing argument, Edwards, representing himself, wrote on the chalk board, "Defendant did not confess." He also told the jury during his closing argument that he did not confess to the detectives. In his rebuttal, the prosecutor made the following statements which Edwards characterizes as impermissible comments on his failure to take the stand but which the state characterizes as a justifiable response to Edwards' statements which were unsupported by the evidence before the jury:

> " 'The evidence, you will recall, is what the witnesses say from the witness stand here under oath. And there is an important thing about witnesses and what they testify to. They are subject to cross-examination. That is, you can ask the witness, "Well, how do you remember that, Mr. Witness? How do you remember this, Mr. Witness? Isn't such and such true, Mr. Witness?"
>
> The witness answers you back. That's testimony. That's evidence.
>
> What evidence is there that he did not confess? Did any witness come in here and say from the witness stand under oath that there was no confession, there was no confession and the police are lying, there was no confession? That incident never occurred.

No, ladies and gentlemen, nobody testified to that. No witnesses were called that testified about that confession not being made. No witnesses whatsoever.

The most conclusive statement is his own statement. He never said he didn't confess other than writing it on the easel.

He told you he wasn't involved in the crime, he wasn't guilty. Here he told you that like I'm telling you, like I'm talking to you, not under oath.'"

In determining whether these statements were improper, we must obviously examine them in the context made. *See State v. Ramirez*, 116 Ariz. 259, 263, 569 P.2d 201, 205 (1977). The state had introduced substantial evidence that Edwards had confessed, including the content of his confession. Edwards chose not to testify at trial. He had introduced no evidence whatsoever that he had not confessed. Before the closing arguments he was warned by the judge not to make statements that were unsupported by the evidence before the jury. Nevertheless, he argued that he had not confessed and wrote "Defendant did not confess" on the chalk board.

Upon reviewing these circumstances, we conclude that Edwards' oral and written statements before the jury were improper since they were wholly unsupported by the evidence. *State v. Dutton*, 106 Ariz. 463, 465–66, 478 P.2d 87, 89–90 (1970). The prosecutor's statements were made in response to Edwards' argument. The error was invited by Edwards. He cannot now raise error that he invited hoping to benefit thereby. *State v. Purcell*, 117 Ariz. 305, 308, 572 P.2d 439, 442 (1977); *State v. Wilcynski*, 111 Ariz. 533, 535, 534 P.2d 738, 740, *cert. denied*, 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed.2d 104 (1975).

FELONY MURDER CONVICTION

[23] Edwards argues that the death of the victim from a heart attack that occurred during the robbery may not form the basis of a felony murder conviction because it was unintended and accidental. The cases are to the contrary. In *State v. Ferrari*, 112 Ariz. 324, 328, 541 P.2d 921, 925 (1975), we noted that a murder that is committed in perpetration of a burglary or any other specifically named felony is punishable as felony murder whether wilful and premeditated or only accidental. *See also State v. Hitchcock*, 87 Ariz. 277, 350 P.2d 681 (1960), *cert. denied*, 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821 (1961); *People v. Stamp*, 2 Cal.App.3d 203, 82 Cal.Rptr. 598 (1969), *cert. denied*, 400 U.S. 819, 91 S.Ct. 36, 27 L.Ed.2d 46 (1970); *State v. McKevier*, 89 N.J.Super. 52, 213 A.2d 320 (1965).

[24] Edwards also contends that a conviction and sentence for robbery, burglary, and murder violate the double-punishment statute, A.R.S. § 13–1641 (now § 13–116). In *State v. Miniefield*, 110 Ariz. 599, 603, 522 P.2d 25, 29 (1974), we held that convictions and sentences for both first degree murder and arson (the underlying felony) did not violate A.R.S. § 13–1641. *Accord, State v. Clayton*, 109 Ariz. 587, 600, 514 P.2d 720, 733 (1973). We find these cases controlling.

SUFFICIENCY OF THE EVIDENCE

[25] Edwards complains that there was not sufficient evidence on which the jury could find that the robbery caused the victim's death. We do not agree. A pathologist testifying for the state indicated that, in his expert opinion, the death resulted from a heart attack induced by the anxiety resulting from being robbed at gunpoint. He reiterated his opinion on cross and again on redirect. We think there was more than adequate competent evidence before the jury to support the causation element.

SENTENCING

[26] Since Edwards was sentenced pursuant to the portions of A.R.S. § 13–454 which we held unconstitutional in *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, — U.S. ——, 99 S.Ct. 1254, 59 L.Ed.2d 478, this case is remanded for resentencing.

We have reviewed the entire record for fundamental error and have examined all arguments raised by Edwards and find that

he was not denied a fair trial. The convictions for robbery, burglary, and first degree murder are affirmed along with the sentences for robbery and burglary. The murder conviction is remanded for resentencing pursuant to *State v. Watson, supra.*

CAMERON, C. J., STRUCKMEYER, V. C. J., and HOLOHAN, J., concur.

GORDON, Justice (dissenting):

The majority opinion states that *Miranda* does not place a per se ban on police questioning of a suspect after he has invoked his right to counsel. This is clearly the law in Arizona. This Court has held that questioning a suspect after he has asserted his *Miranda* rights is permissible, so long as the suspect's right to cut off the questioning is "scrupulously honored." *State v. McGinty,* 120 Ariz. 162, 584 P.2d 1153 (1978); *State v. Hatton,* 116 Ariz. 142, 568 P.2d 1040 (1977).

Similarly, the Ninth Circuit Court of Appeals, in *United States v. Rodriguez-Gastelum,* 569 F.2d 482 (9th Cir. 1978) *cert. denied,* 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978), held that although questioning must stop after a right to counsel is asserted, it can later resume if the suspect makes a waiver of the right. Such a waiver of a previously asserted right must meet the definition pronounced in *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). That is to say, it must be an intentional relinquishment or abandonment of a known right or privilege. The *Rodriguez-Gastelum* opinion specifically concluded that a waiver could meet this test even if the questioning was resumed at the instigation of the police.

The facts of this case, however, do not meet the requirements of either the Ninth Circuit or Arizona case law. Edwards asserted that he wanted an attorney before making a deal. At this point all questioning ceased. The next morning, the detention officer told Edwards that detectives were there to see him. *Edwards told the officer that he did not wish to speak to anyone. The officer told him that he had to.*

Because Edwards was told that he had to talk to the detectives, I disagree with the majority's conclusion that his right to cut off the questioning was scrupulously honored. For the same reason his subsequent statements were not an intentional relinquishment or abandonment of his right to counsel, even though the detectives once again read him his *Miranda* rights. This is evidenced by the fact that when asked at the motion to suppress hearing why he had not once again told these detectives that he wanted an attorney, he responded: "I didn't think you had to keep asking for an attorney over and over and over."

Moreover, I cannot condone the tactics of the investigating detectives. Despite the suspect's prior assertion of his right to counsel, detectives questioned him the following morning, knowing that an attorney would not be appointed for him until the afternoon. I find the language of *State v. Sauve,* 112 Ariz. 576, 544 P.2d 1091 (1976) controlling on these facts.

> "After the defendant's refusal to answer questions, the officers ceased interrogation, but their *subsequent conduct and statements were made to persuade the defendant to reconsider his position.* Any response under such circumstances cannot be considered 'volunteered,' and the statements were not admissible." 112 Ariz. 576, 579, 544 P.2d 1091, 1094. (Emphasis added.)

Despite Arizona's rejection of a per se rule regarding the right to remain silent, a suspect's right to cut off questioning must be scrupulously honored, and his statements must be voluntarily made. Because he was told that he had to talk to the detectives and because the questioning took place shortly before an attorney was to be appointed, I would find the defendant's statements to be inadmissible.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, vs. ROBERT EDWARDS aka WILLIE BAREFIELD, Appellant.	No. 3957 ORDER REMANDING FOR RESENTENCING ON MURDER CONVICTION (MANDATE)

Appeal from the Superior Court of Pima County Number 30683
Honorable Ben C. Birdsall, Judge

Bruce E. Babbitt, Former Attorney General
Robert K. Corbin, The Attorney General
by William J. Schafer, Assistant Attorney General
Crane McClennen, Assistant Attorney General

Attorneys for Appellee

Molloy, Jones, Donahue, Trachta & Childers
by Michael J. Meehan

Attorneys for Appellant

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly ORDERED that the murder conviction of the trial court entered in the above-entitled cause be remanded for resentencing pursuant to State v. Watson, to comply with the opinion of this Court, attached hereto.

DONE IN OPEN COURT this 27th day of March, 1979.

STATE OF ARIZONA
SUPREME COURT

I, CLIFFORD H. WARD, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the

Order Remanding For Resentencing On Murder Conviction, made and entered in the above entitled cause by said Court on the 27th day of March, 1979.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of said Court this 2nd day of May, 1979.

CLIFFORD H. WARD, Clerk

By Mary Ann Hopkins
Chief Deputy Clerk

cc: Hon. Robert K. Corbin, Attorney General; Stephen D. Neely, Pima County Attorney; Hon. Ben C. Birdsall, Judge; Hon. Harry Gin, Pima County Presiding Judge; Department of Corrections; Superintendent of Arizona State Prison; Michael J. Meehan, Esq., Molloy, Jones, Donahue, Trachta & Childers; Robert Edwards aka Willie Barefield; Jim I. Martin, Court Administrator for Pima County.

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA
Phoenix
85007

MARY ANN HOPKINS
CHIEF DEPUTY CLERK

May 2, 1979

STATE OF ARIZONA, Appellee, vs. ROBERT EDWARDS aka WILLIE BAREFIELD, Appellant.	Supreme Court No. 3957 Pima County No. 30683

The following action was taken by the Supreme Court of the State of Arizona on May 1, 1979 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Justice Frank X. Gordon, Jr. voted to grant.

Copy of Order Remanding for Resentencing on Murder Conviction enclosed herewith.

CLIFFORD H. WARD, Clerk
By Pat Goeller
Deputy Clerk

TO: Hon. Robert K. Corbin, Attorney General, 200 State Capitol, Phoenix, Arizona 85007 Attn: Crane McClennen, Esq.
Michael J. Meehan, Esq., Molloy, Jones, Donahue, Trachta, Childers and Mallamo, 33 North Stone Avenue, Tucson, Arizona 85701
Stephen D. Neely, Pima County Attorney, 111 West Congress Street, Tucson, Arizona 85701

REVIEWED
Docketed for per Journal.
1/ Cert by 6/1/22
Date 5/3/79 By

APPENDIX C

FILED
20 June 1979
JAMES N. CORBETT, Clerk
G. McInroy Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

BEN C. BIRDSALL
JUDGE/COURT COMMISSIONER

NO. A-30683

DATE 20 June 1979

THE STATE OF ARIZONA,
PLAINTIFF

David Berkman
PLAINTIFF'S ATTORNEY

ROBERT EDWARDS, aka WILLIE BAREFIELD
DEFENDANT

Michael Meehan
DEFENDANT'S ATTORNEY

MINUTE ENTRY

RESENTENCING:

Defendant present in custody.

Bruce Johnson reporting.

This is the time that the Court has set for Resentencing, the Resentencing is on Count One of the Indictment, MURDER IN THE FIRST DEGREE,

All parties being granted leave to address the Court, Mr. Meehan and Mr. Berkman do so.

The Defendant, Robert Edwards, was adjudged GUILTY of the crime of MURDER IN THE FIRST DEGREE following a jury verdict. The Court made Findings of Fact on June 15, 1977, and those Findings of Fact are confirmed again at this time, except that the Court is now entitled to consider any mitigating circumstances that appear in the entire record in this case.

THE COURT DOES FIND that there are mitigating circumstances and the mitigating circumstances are sufficiently substantial to call for leniency, and the Defendant's Sentence should be reduced from death to life imprisonment pursuant to the Statute for this offense.

IT IS ORDERED that the Sentencing of June 21, 1977, is SET ASIDE as to the Sentence of death on the conviction in Count One,

JAMES N. CORBETT Clerk

By G. McInroy
Deputy

APPENDIX D

MINUTE ENTRY

Page No. 2 Date 20 June 1979 Case No. A - 3 0 6 8 3

MURDER IN THE FIRST DEGREE, and the Defendant is Sentenced to LIFE IMPRISONMENT on that Count. The Sentence is to commence as of January 19, 1976, which is the first date that the Defendant was incarcerated on these charges. The Sentence is to also run concurrently with the Defendant's other Sentences in this case.

The mitigating circumstances which the Court Finds, and this is by special verdict of the Court, are: 1) that the Defendant had not intended to kill the victim of the murder, and: 2) that the death, although the Court is not setting aside the Findings that the Defendant could reasonably have foreseen that his conduct in the crime would cause or create a grave risk or cause death to another person, the death was one that was very unusual and not expected, and: 3) the offenses committed by the Defendant were committed with other persons. The Court believes that a sentence of death in this case for this Defendant would be disproportionate recognizing the disposition which has been made of the other Defendants who were involved in the crime. There is particularly one Defendant who testified and was given immunity by the State, whose conduct in the commission of the offense was more reprehensible than Mr. Edwards'.

Thereupon the Defendant is advised of his right to appeal this resentencing and appeal procedure. The Defendant signs and receives a copy of the Notice of Right to Appeal and Appeal Procedure form.

FILED IN COURT: Notice of Right to Appeal and Appeal Procedure form.

Ben C Birdsall
JUDGE

copies to:
Court Administrator
Hon. Ben C. Birdsall
County Attorney - D. Berkman
Molloy, Jones, Donahue & Trachta - Meehan
Adult Probation
Department of Corrections (1 certified)
Sheriff (2 certified)
Computer
Arizona State Prison (1 certified)
Appeals Desk
Newspaper
CVC

G. McInroy, Deputy Clerk.

REVIEWED
Docketed appeal - yes

ABBREVIATED RECORD REFERENCES

TRANSCRIPTS OF PRETRIAL MOTIONS

I M - March 2, 1977
II M - March 3, 1977
III M - March 4, 1977
IV M - March 7, 1977
V M - March 2, 1977
March 11, 1977
March 14, 1977
March 16, 1977
VI M - March 22, 1977

TRIAL TRANSCRIPT PROCEEDINGS (MISTRIAL)

I P - March 17, 1977
March 18, 1977
II P - March 21, 1977
III P - March 22, 1977
IV P - March 24, 1977
March 28, 1977

TRIAL TRANSCRIPT PROCEEDINGS (SECOND TRIAL)

I Tr. - April 20, 1977
II Tr. - April 21, 1977
III Tr. - April 22, 1977
IV Tr. - April 25, 1977
V Tr. - April 26, 1977
April 27, 1977

POST-TRIAL MOTIONS AND SENTENCING

May 16, 1977
May 23, 1977
May 26, 1977
June 2, 1977
June 8, 1977
June 10, 1977
June 15, 1977
June 21, 1977

TRIAL COURT PLEADINGS

R. (With index number to appellate record)